Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

REZA SEDIGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO: The Honorable Chief Justice of the United States and The Honorable Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Fifth Circuit entered on October 9, 1981, that affirmed the judgment and conviction entered against the petitioner in the United States District Court for the Eastern District of Louisiana in Criminal Case No. 80-31 "K".

QUESTION PRESENTED

In a federal prosecution for conspiracy to obtain and possess unregistered firearms, is it not a denial of the accused's Fifth Amendment right to due process for the trial court to fail to exclude as inadmissible, for reasons of irrelevancy, immateriality and prejudice, the following: (1) testimonial evidence from a federal agent that implied that the petitioner, a potential transferee, was required to take steps to secure permission from the Secretary of the United States Treasury to possess the firearms which were the subject of the indictment, when, under the applicable statutes and judicial opinions interpreting the statutes (e.g. *United States v. Freed*, 401 U.S. 601), there is no such legal requirement; and (2) physical evidence consisting of Government Exhibit 7A, a two-page document otherwise described as Bureau of Alcohol, Tobacco and Firearms Certificates, the second page of which certified that no firearms were registered to or otherwise lawfully acquired by petitioner, when, in the circumstances and facts of this case, the law did not require that the petitioner be certified as having registered or lawfully acquired any firearms?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Reza Sedigh, Michael Colton and William Brooks were all parties (co-defendants) in Criminal No. 80-31 "K" in the United States District Court for the Eastern District of Louisiana. All were convicted. Only Reza Sedigh and Michael Colton appealed their conviction to the United States Court of Appeals for the Fifth Circuit. Both convictions were affirmed. Reza Sedigh, is the sole petitioner before this Court.

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OPINIONS BELOW

There was no opinion in the United States District Court for the Eastern District of Louisiana in this case.

There was an opinion of the United States Court of Appeals, in the form of a published memorandum, cited as United States Court of Appeals, Fifth Circuit, No. 80-3822, and which is appended hereto.

JURISDICTION

The Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment To The United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 United States Code

§ 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 United States Code

§ 5812(a), (b):

(a) Application.—A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearms is identified in the application form in such manner as the Secretary may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. (Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.)

(b) Transfer of possession.—The transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

26 United States Code

§ 5861(b):

It shall be unlawful for any person—

(b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; . . .

26 United States Code

§ 5845(a)(6), (7):

For the purpose of this chapter—

(a) Firearm.—The term "Firearm" means . . . (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; . . .

STATEMENT OF THE CASE

The prosecution of Reza Sedigh, Michael Colton, and William Brooks was the culmination of a two-month undercover investigation conducted by agents of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury (ATF). The investigation began on October 22, 1979, when one Fred Peel contacted ATF concerning his having been approached by Michael Colton regarding the acquisition of silencers (Tr. at 302, 303).[1] The trial testimony of the petitioner Sedigh was that he had contacted William Brooks for assistance in locating a source for silencers on behalf of pro-American people in Iran (Tr. at 452, 455, 457, 466); Brooks in turn contacted Colton (Tr. at 537, 538), who contacted Peel.

Peel, under instructions from ATF agents, introduced ATF special agent Grafton, acting in an undercover capacity, to Colton on October 24, 1979 in New Orleans,

[1] "Tr." refers to the transcript of the trial proceedings.

Louisiana (Tr. at 303,545). Colton next met Agent Grafton on the following day in Slidell, Louisiana to discuss the acquisition of silencers (Tr. at 547-549). At that meeting, it was established that Grafton could supply firearms, and that Colton would arrange to introduce Grafton to the person who was the party in interest, at which time other specific's would be discussed. (Government's Exhibit 2c).

Thus, on October 31, 1979, in New York City, New York, Brooks introduced Colton and Grafton to Sedigh (Tr. at 472). Grafton, who was introduced as a factory salesman, displayed two machine guns with silencers to Sedigh (Tr. at 473). Sedigh expressed an interest in two hundred fifty silencers (Tr. at 473, 477) and one thousand long-range rifles (Tr. at 82), the understanding being that Grafton would supply them. Grafton and Sedigh spoke again on November 3, 1979, at which time Sedigh reiterated an interest in the silencers (Government's Exhibit 3E; Tr. at 99).

Sedigh met with Grafton on two other occasions: on November 8, 1979 in Fat City, Louisiana and on November 28, 1979 in Falls Church, Virginia. At the first of those meetings,[2] Grafton displayed several types of military firearms (Tr. at 101) and Sedigh again said that he wanted silencers and long-range rifles (Tr. at 491-495). At the November 28th meeting, Colton, Sedigh, Brooks, Grafton and ATF agent Roger Clanton were present and Clanton conducted the test-firing of a Winchester-70 long-range rifle with a silencer (Tr. at 121, 123, 504). Afterwards, the group discussed a sales transaction with regard to the firearms (Tr. at 123, 124). Sedigh wanted to keep the Winchester-70 rifle but Grafton refused (Tr. at 123, 124, 504). No transaction was made.

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[2] The November 8, 1979 meeting was video taped and entered into evidence as Government's Exhibits 4A and 4B.

Agent Grafton next spoke with Sedigh, and for the last time, on December 17, 1979, at which time Sedigh expressed his displeasure with Grafton, as the Government's evidence showed, for not allowing Sedigh to keep the rifle at the November 28th meeting. As Sedigh's testimony indicated, he, at that time, emphasized his desire not to do business with, or purchase weapons from, Grafton (Tr. at 505, 508, 509). The conversation between Grafton and Sedigh on December 17, 1979 represented the last significant event of the ATF's investigation.

As a result of the above-described undercover efforts of ATF agents, petitioner Sedigh was put on trial with Colton and Brooks in the United States District Court for the Eastern District of Louisiana, the three of them having been indicted by a federal grand jury, for the federal offense of conspiracy to violate the firearms laws (26 U.S.C. §§ 5812(b), 5861(b), 5845(a)(6), (7)). During trial, defense counsel made specific objections to the following: (1) Testimony of Government witness, ATF Agent Curtis Williams, as to whether petitioner applied for registration or affirmatively secured permission to receive firearms (Tr. at 381); and (2) the introduction into evidence of registration certificates showing that no firearms were registered to or otherwise lawfully acquired by the petitioner (Tr. at 381).

The objections of counsel for Mr. Sedigh were overruled. The testimonial and documentary evidence was admitted. Mr. Sedigh was subsequently convicted of conspiracy to violate firearms laws. He appealed on grounds that the admission of the said evidence was prejudicial error which warranted reversal of the conviction. On October 9, 1981 the United States Court of Appeals for the Fifth Circuit affirmed the conviction.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Fifth Circuit has sanctioned such a departure, by the trial court in this case, from the accepted and usual course of proceedings, as to warrant the exercise of this Honorable Court's power of supervision. This Court established long ago that evidence which is not relevant and which has a prejudicial tendency should not be admitted. See *Williams v. New York*, 37 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 337 (1949). See also *Williams v. United States*, 168 U.S. 382, 18 S.Ct. 92, 42 L.Ed. 509 (1897). Indeed, these procedures are codified by Rules 402 [3] and 403 [4] of the Federal Rules of Evidence. Thus, the exclusion of irrelevant and/or prejudicial evidence has become a crucial part of the established standard course of proceedings in our federal judicial system. To allow federal courts of appeals to sanction the disregard of these precious standards, would, in effect, be to condone an abuse of procedural fairness and due process.

The petitioner submits that the Fifth Circuit Court of Appeals has left uncorrected a crucial error of the trial court, namely, the admission of irrelevant and highly prejudicial evidence. The issue raised by the petitioner in the Circuit Court was the admissibility, over objection, of both testimonial and documentary evidence that the petitioner had not obtained permission from the Secretary of the Treasury to obtain any of the firearms in evidence. (Transcript at pp. 374-377, 381.) That evidence strongly implied that, by the petitioner's said omission, the petitioner violated the law. However, as is set forth below, the petitioner, a po-

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[3] Rule 402, "Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible."

[4] Rule 403, "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time."

tential transferee, was not required by law either to apply for the registration of firearms, or to affirmatively secure permission from the Secretary of the Treasury to possess firearms, under the circumstances and facts of this case. See 26 U.S.C. § 5812(b).

The government's evidence at trial was that agents of the ATF, acting undercover, were negotiating with the defendants to sell them a quantity of rifles, automatic weapons and silencers.[5] The defendants never obtained any of the weapons. Indeed, nothing occurred other than discussions about the weapons between the undercover agent and the defendants; and the showing and demonstrating of the weapons by the agents. The petitioner testified that he believed that the undercover agent was a legitimate, gun-factory salesman, who would attend to the registration requirements of the law. (Transcript at pp. 472-73, 489.) There was no evidence in the case that the sellers/"transferors" (agents) were not going to register the firearms; or that the petitioner knew, believed, or had reason to believe, that they would not do so. (Transcript at 459, 461-62.)

According to the provisions of the statutes under which the petitioner was charged, the duty to register firearms lies with the transferor. "The transferor—not the transferee—does the registering." *United States v. Freed*, 401 U.S. 601, 605, 91 S.Ct. 1112, 116, 28 L.Ed.2d 256 (1971); 26 U.S.C. § 5812(a). In other words, a transferee of firearms violates Title 26 U.S.C. § 5812(b) and § 5861(b) by receiving or taking possession of firearms that have not been registered according to the law; but he does not violate the statute by failing to register for, or to affirmatively secure permission to receive, firearms.

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[5] Under the Gun Control Act, the term "firearm" includes machine guns and silencers, but not long rifles. 26 U.S.C. § 5845(a) (1980).

United States v. Freed, supra; United States v. Parker, 566 F.2d 1304 (5th Cir. 1978); *United States v. Vasquez,* 476 F.2d 730 (5th Cir. 1973), *cert. denied,* 414 U.S. 836, 94 S.Ct. 181, 38 L.Ed.2d 72..

The objectionable and challenged testimony (from the ATF case agent) was: that upon inquiry, he was advised by ATF headquarters in Washington, D.C. that there was no record that the petitioner had made application or received permission to possess any of the firearms. (Transcript at p. 381.) Following this, the agent identified documents of certification that showed that no firearms were registered to, or lawfully acquired by, the petitioner. *Id.* These documents were placed in evidence. The said evidence was prejudicial, in that, it improperly placed upon the petitioner an affirmative duty which is not in fact imposed by the statute; consequently, strongly implying illegality on his part. The error in admitting this testimony was greatly compounded when, on cross-examination of the case agent, the defendants sought to have him explain that the defendants were not required to register the transaction. The trial court sustained an objection by the Government in this line of questioning, which terminated the inquiry.[6] The exclusion of this cross-examination testimony, designed to correctly focus and explain the statutory requirements vis-a-vis the transferee, left the erroneous impression still with the jury that the defendant had failed to follow the law.

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[6] Q. [To Agent Williams, by Counsel for Defendant Sedigh on cross-examination]: ". . . So it is correct, is it not, that under this statute, the transferee, the person who is going to receive the firearms, doesn't have to fill out anything, doesn't have to submit anything, that the responsibility under the law is on the transferor?

THE PROSECUTION: Again, Your Honor——

THE COURT: I'm going to sustain it. He has explained the procedure. (Tr. at 425)

Central to the opinion of the Circuit Court, sustaining the admission of the evidence regarding the defendant's non-registration of the firearms, was its analysis that, in a conspiracy, the prosecution must prove that the transferee conspired to receive or possess unregistered firearms. Thus, the court found that nonregistration was an element of the crime. Though theoretically correct, this analysis misses the point of the petitioner's objection. Certainly, the essence of a conspiracy such as the one alleged in this case, which the government undertook to prove, was the receipt and possession of unregistered firearms. But, evidence to the effect that the petitioner-transferee, who had no duty to register the firearms, did not do so, had no more probative force than proof that the federal agents, acting as sellers, had no intention to register the firearms, and did not do so. Nonregistration as required by law, in the facts of this case, resided in the intention of the parties; and could only be evidenced by their declarations and acts—wholly outside the framework of the application requirements of the statutes. Agent Williams' testimony indicating that the petitioner had such a responsibility "is irrelevant in that it is simply not logically connected to, and can therefore have no bearing upon, the ultimate proof required of the Government." See *United States v. Allison*, 474 F.2d 286, 288 (5th Cir. 1973) (conviction for violation of 18 U.S.C. §§ 371, 1001, reversed where evidence was irrelevant to the offense charged). The testimony is also immaterial, for it has "no probative value for proving he committed the crimes charged." *Id.* In light of the irrelevance, immateriality, and prejudicial nature of the said evidence, it should not have been admitted. See *Williams v. New York*, supra; *Williams v. United States*, supra; *Hall v. United States*, 150 U.S. 76, 14 S.Ct. 22, 37 L.Ed. 1003 (1893).

These admissions by the trial court were clearly detrimental to your petitioner and they violated his right to pro-

cedural due process under the Fifth Amendment. They should not have been sanctioned by the Circuit Court. For this and other reasons stated above, this Court should grant certiorari.

Respectfully submitted,

MITCHELL, SHORTER & GARTRELL

By: /s/ John A. Shorter, Jr.

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition was mailed, postage prepaid, this 8th day of December, 1981 to: Harry P. Pastuzek, Jr., Esquire, Assistant United States Attorney, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130; and Solicitor General, United States Department of Justice, Washington, D.C. 20530.

By: /s/ John A. Shorter

JOHN A. SHORTER, JR.

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Reza SEDIGH and William D. Brooks,
Defendants-Appellants.

No. 80-3822.

United States Court of Appeals,
Fifth Circuit.*
Unit A

Oct. 9, 1981.

Defendants were convicted in the United States District Court for the District of Louisiana, George Arceneaux, Jr., J., of conspiring to possess unregistered firearms. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) evidence of nonregistration of firearms was admissible, although defendants had not taken possession of any firearms; (2) trial court did not err in its handling of jury misconduct allegations; (3) defendants were not entitled to mistrial on basis of Government's closing argument in which Government remarked that defendants had admitted committing crime by pleading entrapment; and (4) evidence was sufficient to support convictions.

Affirmed.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

1. Internal Revenue—4311

Under the Gun Control Act the duty to register firearms lies with the transferor. 26 U.S.C.A. §§ 5801 et seq., 5812(a).

2. Internal Revenue—4311

Under the Gun Control Act, it is unlawful for transferee to receive or possess an unregistered firearm, regardless of transferee's knowledge of registration requirement. 26 U.S.C.A. § 5801 et seq.

3. Conspiracy—45

In prosecution for conspiring to possess unregistered firearms, evidence of nonregistration of firearms, although defendants had not taken possession of any firearms, was admissible in light of fact that the evidence was both relevant and not prejudicial. 26 U.S.C.A. §§ 5801 et seq., 5812; Fed. Rules Evid. Rules 401-403, 28 U.S.C.A.

4. Criminal Law—925(1)

Trial court's duty in deciding motion for new trial when jury misconduct is alleged must be judged on peculiar facts and circumstances of each case.

5. Criminal Law—1156(5)

Trial court's decision regarding motion for new trial when jury misconduct is alleged will be reversed only upon showing of an abuse of discretion.

6. Criminal Law—959

In deciding motion for new trial when jury misconduct is alleged, trial court must begin with assumption that jury is impartial and upon receiving colorable claim of extrinsic influence on that impartiality, trial court should investigate

asserted impropriety to determine initially if and what extrinsic factual matter was disclosed to jury.

7. Criminal Law—868

In criminal prosecution, trial court did not err in its handling of jury misconduct allegation where trial court actually held hearing on matter and defenadnts failed to prove an existence of a jury breach.

8. Criminal Law—730(16)

In criminal prosecution ,Government's remark in closing argument to the effect that defendants had admitted committing crime by pleading entrapment did not require declaration of mistrial in light of fact that Government's remark was rebuttal to defendant's own arguments on entrapment, trial court gave contemporaneous curative instruction to jury, remark did not seriously misstate law, and thus there was no prejudice.

9. Criminal Law—37(1)

Defendant cannot both plead entrapment and deny committing acts on which prosecution is predicated.

10. Conspiracy—47(9)

Evidence supported defendants' convictions for conspiring to possess unregistered firearms. 18 U.S.C.A. § 371; 26 U.S.C.A. §§ 5801 et seq., 5812(a), (b), 5845(a), 5861(b).

Appeals from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellants Reza Sedigh and William Brooks were convicted under 18 U.S.C. § 371 for conspiring to possess unregistered firearms in violation of sections 5812(b) and 5861(b) of the Gun Control Act of 1968, 26 U.S.C. § 5801 *et seq.* (1980). The convictions resulted from an undercover investigation by agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF), who posed as gun dealers offering to sell to appellants a large number of rifles, automatic weapons, and silencers.[1] These firearms were not registered as required by section 5812(a) of the Act. Appellants, however, never took possession of any firearms.

I.

The central issue presented in this appeal is whether, in a conspiracy trial under 26 U.S.C. §§ 5812(b) and 5861(b), the trial court may admit evidence of the absence of firearm registration when the defendant has not taken possession of any firearms. Appellants argue that evidence of nonregistration was irrelevant here because sections 5812(b) and 5861(b) prohibit only the possession of unregistered firearms; moreover, appellants claim that such evidence was prejudicial because it erroneously implied to the jury that appellants as potential transferees of firearms had a duty to regitster. We find, however, that the evidence of nonregistration was properly admitted, as will be shown below.

[1-3] We agree with appellants that under the Gun Control Act the duty to register firearms lies with the transferor. "The transferor—not the transferee—does the registering." *U.S. v. Freed*, 401 U.S. 601, 605, 91 S.Ct. 1112,

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[1] Under the Gun Control Act, the term "firearm" includes machine guns and silencers, but not long rifles. 26 U.S.C. § 5845(a) (1980).

1116, 28 L.Ed.2d 256 (1971); 26 U.S.C. § 5812(a). But the Act also makes it unlawful for the transferee to receive or possess an unregistered firearm, regardless of the transferee's knowledge of the registration requirment. "The Act requires no specific intent or knowledge that the [firearms] were unregistered"; it requires only that the transferee not receive or possess unregistered firearms. *U.S. v. Freed*, 401 U.S. at 607, 91 S.Ct. at 1117, 28 L.Ed.2d 256 (1971); 26 U.S.C. §§ 5812(b), 5861(b), 5861(d) (1980). Appellants were thus properly charged and convicted for conspiring to possess unregistered firearms, and not—as appellants' argument implies—for conspiring to fail to register firearms.[2] For this purpose, the evidence of nonregistration was neither irrelevant nor prejudicial.

First, evidence of nonregistration is both factually and materially relevant in a conspiracy charge under sections 5812(b) and 5861(b). The evidence of nonregistration offered in thise case certainly tended to prove the fact of nonregistration.[3] And the fact of non registration is a

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[2] It makes no difference here that appellants were charged with conspiracy rather than with substantive violations. As the Supreme Court noted in *Freed*, "[w]e need not decide whether a criminal conspiracy to do an act 'innocent in itself' and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades [or, as in this case, machineguns and silencers] is hardly an agreement innocent in itself. Therefore what we have said of the substantive offense satisfies on these special facts the requirements for a conspiracy. . . ." *U.S. v. Freed*, 401 U.S. at 609 n.14, 91 S.Ct. at 1118 n.14, 28 L.Ed.2d 256 (1971).

[3] The evidence of nonregistration came primarily from ATF agent Curtis Williams. After appellants' objections had been overruled, agent Williams answered the following questions:

> Q. (By Mr. Pastuszek) Agent Williams, what steps, if any, did you take to determine if any of the defendants had obtained permission from the Secretary of the Treasury to obtain the types of firearms which were found in Government Exhibits 5A through 5L?

material issue in establishing a conspiracy to possess unregistered firearms. Indeed, proof of nonregistration is essential: Section 5812(b) requires that "[t]he transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm as required by subsection (a) of this section."

A. I made an inquiry to our headquarters records group in Washington, D.C., by submitting the names and various other descriptive data on the defendants to determine whether there was in fact a record in their name.

Q. And what was the result of your attempts to get information with respect to the defendants?

A. The response from our Washington branch was that none of the three defendants had any type of record whereas they had made application or received permission to possess any of these types of firearms.

Transcript at 380-81. Agent Williams then identified the documents of certification that showed appellants' lack of permission to possess firearms:

Q. I now show you Government [Exhibits] 7A, B, and C. and ask you if you can identify that.

A. Yes, I can.

Q. How can you identify them, Agent Williams?

A. These are documents of certification, based on my request, to our records section in Washington, D.C. They were sent to me directly. I received them from Washington, D.C. after making the request for a records check in the name of Reza Sedigh, Michael Colton and William Brooks.

MR. PASTUSZEK: Okay. At this time, Your Honor, Government offers into evidence Government Exhibits 7A, 7B and 7C, and requests permission to publish them to the Jury.

Transcript at 381.

While these questions and answers were not the ideal manner in which to prove nonregistration, they did in fact tend to do so. The absence of appellants' names from the Treasury Department records could only occur if the firearms were not properly registered. *See* 26 U.S.C. § 5812(a)(1980) (requiring the registration application to identify the transferee and to include his fingerprints and his photograph). Of course, the firearms also were not registered under the transferor's name, since the transferor here was the ATF undercover agent. Thus, the evidence shows the firearms to be unregistered.

Section 5861(b) makes it unlawful for any person "to receive or possess a firearm transferred to him in violation of the provisions of this chapter." A conspiracy prosecution under these sections must therefore prove that the transferee conspired—intentionally agreed to join others in concerted effort—to receive or possess unregistered firearms. In short, nonregistration is an element of the crime.

Additionally, the evidence of nonregistration did not mislead the jury about the duty of registration, because the trial court properly instructed the jury on the law to be applied:

> To establish the offense with which the defendants are charged, there are two essential elemnts which the Government must prove beyond a reasonable doubt.
>
> First: The defendants at the time and place charged in the indictment knowingly conspired to receive or possess a machine gun or a silencer; and
>
> Second: The machine gun or silencer intended to be received or possessed was not to be transferred and registered with the approval of the Secretary of the Treasury.

Transcript at 649. Using this explanation of the law, the jury could not convict appellants simply for failing to register the firearms. The trial court clearly required the jury to find a conspiracy to possess unregistered firearms. Indeed, the trial court's instructions on specific intent presented a legal standard more favorable to appellants than the standard established by the Gun Control Act: the trial court required "proof beyond a reasonable doubt that a defendant had knowledge that the firearms had not been properly registered," Transcript at 651, when "[t]he Act requires no specific intent or knowledge that the [firearms] were unregistered," *U.S. v. Freed*, 401 U.S. at 607, 91 S.Ct. at 1117, 28 L.Ed.2d 256 (1971). In light of these instruc-

tions, the evidence of nonreigstration cannot be viewed as prejudicial or misleading.

The instructions also cured any possible confusion caused by the trial judge's comment upon the evidence of nonregistration. During the discussion of appellants' objections to this evidence, the trial judge said: "Whether or not they did [have permission from the Secertary of the Treasury] or not is the ultimate issue involved in this lawsuit, in the Government's case." Record at 374. Of course, nonregistration was a crucial issue; in some sense it may have been the ultimate issue. Nevertheless, at the close of evidence the trial court properly instructed the jury on the law to be applied:

> Do not assume from anything I have said or done that I have any opinion concerning any of the issues in this case. Except for my instructions on the law, you should disregard anything I may have said or done during the trial in arriving at your own findings as to the facts.

Transcript at 640. This instruction, combined with the trial court's accurate statement of the applicable law, prevented the jury from placing undue emphasis on nonregistration alone.

Thus, because the evidence of nonregistration was both relevant and not prejudicial, it was properly admitted under the Federal Rules of Evidence. Fed.R.Evid. 401, 402, 403.

II.

Appellants also argue that the trial court erred in its handling of a jury misconduct allegation. At the end of trial, the trial court received an affidavit from Mrs. William Brooks, the wife of appellant Brooks, swearing that an anonymous telephone caller had told her that the Marshal in charge of the jury had informed two jurors of appellant

Brooks' prior conviction for conspiracy.[4] The trial court held an *in camera* hearing in which it determined that no basis existed for any further investigation. Appellants claim that the trial court should have conducted a full jury investigation to ensure that the alleged extrinsic evidence did not influence the jury. We disagree.

[4, 5] The trial court's duty in deciding a motion for new trial when jury misconduct is alleged must be judged on the peculiar facts and circumstances of each case. *U.S. v. McKinney*, 434 F.2d 831, 833 (5th Cir. 1970). And the trial court's decision will be reversed only upon a showing of an abuse of discretion. *U.S. v. Chiantese*, 582 F.2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979).

[6, 7] Of course, the trial court must begin with the presumption that the jury is impartial. Upon receiving a colorable claim of extrinsic influence on that impartiality, the trial court should investigate the asserted impropriety to determine initially if and what extrinsic factual matter was disclosed to the jury. *U.S. v. Winkle*, 587 F.2d 705, 714 (5th Cir.), cert. denied, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). Here, the trial court actually held

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[4] Mrs. Brook's statement read as follows:

> After the trial was over, my husband and I returned to the St. Charles Hotel on St. Charles Avenue, where we were staying while in New Orleans. Between 8:30 p.m. and 9:00 p.m., approximately, the telephone rang in our room which was Room 412. I answered it and a woman asked if I was Mrs. Brooks. I answered yes and she said I am a concerned person (or party) and there is something you people need to know. She then said the Marshal told two of the Jurors that Mr. Brooks had had a previous conviction of conspiracy and was found guilty. She then hung up the phone before I could say anything. That was the extent of the phone call. To my knowledge, I had never heard her voice before.

Brief of Appellant Brooks, at 10.

a hearing to question under oath Mrs. Brooks and the two Deputy Marshals in charge of the jury. Mrs. Brooks simply repeated her affidavit, and the Deputy Marshals flatly denied the allegations. In short, appellants failed to prove even the existence of a jury breach. Under these circumstances—when the allegations remain speculative—the trial court need not inquire further. *See U.S. v. Howard*, 506 F.2d 865, 868-69 (5th Cir. 1975). It was thus not an abuse of discretion here to refuse to conduct a full jury investigation.

III.

[8] In closing argument, the government remarked that appellants had admitted committing the crime by pleading entrapment.[5] Appellants claim that this was a misstatement of law sufficient to support their motion for mistrial. We find, however, that the trial court properly denied the motion for mistrial, because the government's argument caused no prejudice.

First, the trial court gave a contemporaneous curative instruction to the jury:

> The Court instructs you at this time to erase from your memory any inference or references that anyone in this case has confessed guilt. Guilt is something which the Government is required to prove beyond a reasonable doubt. You are, therefore, to enter the Jury room with the facts as you've heard them, the evidence as you have heard it, the Court's instructions as I will give them to you. You're entitled to listen

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[5] Transcript at 629. The government remark was a rebuttal to appellants' own arguments on entrapment. Counsel for appellant Brooks and for codefendant Michael Colton both discussed entrapment in their closing arguments. Transcript at 601, 613, 626. Appellant Sedigh adopted the arguments of his codefendants. Transcript at 588. And the trial court later instructed the jury on the defense of entrapment. Transcript at 652-53.

> to the arguments of counsel, but the presumption of innocence goes into that Jury room with you, and you have to understand that it's the Government's duty to prove these defendants guilty beyond a reasonable doubt of the crime charged. You are, therefore, to ignore and strike from your minds any statement or inference that anyone in this case has confessed guilt.

Transcript at 630. This instruction emphatically removed the possibility of prejudicial inference from the government's remark, and, more importantly, it reinforced the appellants' presumption of innocence. Any potential harm to appellants was simply not allowed to materialize.

[9] Moreover, the government's remark did not seriously misstate the law. The general rule of this Circuit is that a defendant cannot both plead entrapment and deny committing the acts on which the prosecution is predicated. *U.S. v. Brooks*, 611 F.2d 614, 618 (5th Cir. 1980). Of course, this is not an inflexible rule, and it is not equivalent to a confession of guilt. But the government's remark was a reasonable, if simple, statement of the general rule. And the trial court's accurate jury instruction on entrapment, Transcript at 652-53, presented the jury with the full law of entrapment, thus ensuring that the government's remark did not create any misunderstanding. The trial court, therefore, did not commit reversible error by refusing to grant a mistrial.

IV.

[10] Finally, appellants challenge the sufficiency of the evidence to support their convictions. We reject this claim.

The facts adduced at trial show beyond doubt that on several occasions appellants attempted to gain immediate possession of firearms that were not registered. At the October 31 meeting in New York City, both appellants sought to obtain the two machineguns brought by ATF undercover

agent W. Lloyd Grafton as display weapons. Transcript at 64-66, 81, 143. In a November 2 telephone conversation, codefendant Colton advised agent Grafton that appellant Sedigh wanted to get five weapons from Grafton at that time or when they met again. Transcript at 106. At the November 8 meeting in Fat City, appellant Sedigh offered to purchase several firearms with silencers. Transcript at 150-52. And at the November 28 meeting in Falls Church, both appellants attempted to obtain the display long rifle with its silencer. Transcript at 123-24. None of these firearms were registered. This evidence, viewed in a light most favorable to the government, leaves no reasonable doubt that appellants conspired to receive or possess unregistered firearms in violation of 26 U.S.C. §§ 5812(b) and 5861 (b).

For the foregoing reasons, the district court decision is affirmed.

Adm. Office, U.S. Courts—West Publishing Co., Saint Paul, Minn.

United States of America vs.

DEFENDANT

Sep 23 2 32 PM '80

CLERK

United States District Court for the EASTERN DISTRICT OF LOUISIANA

DOCKET NO. CRIMINAL 80-31 "E"

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR SEPTEMBER 29, 1980

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL [redacted] (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a [redacted] verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. To Count 1 on August 15, 1980.

Defendant has been convicted as charged of the offense(s) of VIOLATION OF TITLE 18 USC 371

CONSPIRACY TO RECEIVE & POSSESS FIREARMS

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years; the defendant is to serve six (6) months of the sentence imposed in a jail type confinement, and serve the remainder of the sentence imposed on active probation with the following stipulations:

1. The defendant is to become gainfully employed.
2. The defendant is not to own, possess, use, or deal with firearms.
3. The defendant is not to leave the Continental United States while on probation.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by: [redacted] U.S. District Judge

[ ] U.S. Magistrate

CLERK'S OFFICE A TRUE COPY

SEPTEMBER 29, 1980

Deputy Clerk

DOCUMENT No.